IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re SRBA	)	**Subcase Nos. 36-02708, 36-07201, 36-07218, 36-02048, 36-02703, 36-04013A, 36-04013B, 36-04013C, 36-07040, 36-07148, 36-07568, 36-07071, 36-02356, 36-07210, 36-07427, 36-07720, 36-02659, 36-07004, 36-07080 and 36-07731**
Case No. 39576	)	**ORDER ON CHALLENGE (Consolidated Issues) OF "FACILITY VOLUME" ISSUE AND "ADDITIONAL EVIDENCE" ISSUE**

I.
APPEARANCES

Professor D. Craig Lewis, Esq., Moscow, Idaho, and Ms. Dana Hofstetter, Esq., Beeman & Hofstetter, Boise, Idaho, for North Snake Ground Water District, May Farms Ltd., and Faulkner Land & Livestock Company

Mr. Daniel Steenson, Esq., Ringert Clark, Boise, Idaho, for Clear Lakes Trout Company

Mr. Norman Semanko, Esq., Rosholt Robertson & Tucker, Twin Falls, Idaho, for Clear Springs Foods Inc. and Blue Lakes Trout Farm Inc.

Mr. Patrick Brown, Esq., Jerome, Idaho, for John W. Jones Jr.

II.
ORAL ARGUMENT AND MATTER DEEMD FULLY SUBMITTED FOR DECISION

Oral argument on this Consolidated Challenge was held in open court on November 1, 1999. At the conclusion of argument, no party sought to present additional briefing or authorities

and, the Court having requested none, this matter is deemed fully submitted for decision on the next business day, or November 2, 1999.

III.
ISSUES PRESENTED

This Challenge on Consolidated Issues was filed by the North Snake Ground Water District ("NSGWD") on behalf of its members, including Faulkner Land & Livestock Company and May Farms Ltd. The 20 subcases listed in the caption above involve water rights for fish propagation facilities in the Hagerman area of Idaho.

NSGWD raises two consolidated issues in these fish propagation subcases.

1. Did the [respective][1] Special Master err in ruling that facility volume is not "necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director"? Idaho Code § 42-1411(2)(j) (Supp. 1998)? ("facility volume" issue).

2. Which standard is applicable to the submission of evidence in conjunction with motions to alter or amend special masters' reports in the SRBA, Rule 59(e), I.R.C.P. which applies post-judgment, or Rule 53(e)(2), I.R.C.P. which applies to special master's reports? ("additional evidence" issue).

IV.
"FACILITY VOLUME" ISSUE

THE ISSUE

As noted above, the issue is stated by NSGWD to be:

> Did the [respective] Special Master err in ruling that facility volume is not "necessary for definition of the right, for clarification of any element of a right, or for

[1] The Court uses the phrase "respective Special Master" because each of the three Special Masters then in the SRBA were assigned to one or more of the various subcases and issued reports and recommendations in these subcases. Because these two issues are common between the subcases and because each of the Special Masters ultimately ruled against including a facility volume remark, or allowing additional evidence at the motion to alter or amend stage, the subcases were consolidated on appeal for these two consolidated issues. Special Master Haemmerle heard Clear Springs Foods Inc. subcases 36-04013A, 36-07148, 36-07040, 36-07201, 36-07568, 36-02703, 36-04013B, 36-02708, 36-07218, 36-02048, and 36-04013C; Special Master Bilyeu heard John W. Jones Jr. subcase 36-07071; and Special Master Dolan heard Blue Lakes Trout Farm Inc. subcases 36-07720, 36-07427, 36-07210, and 36-02356 and Clear Lakes Trout Co. subcases 36-02659, 36-07004, 36-07080, and 36-07731. For reasons unknown to this Court, the then Presiding Judge did not reference all of these subcases to one Special Master.

administration of the right by the director"? Idaho Code § 42-1411(2)(j) (Supp. 1998).

ELEMENTS OF A WATER RIGHT – I.C. § 42-1411(2)(a)-(j)

Also as noted above, these consolidated subcases deal with fish propagation facilities in the Hagerman valley.

When the respective water right claims were reported out by the Director (IDWR), each included a facility volume remark.

"Facility volume" is not defined by statute or appellate case law and is not a specifically enumerated element of a water right under I.C. § 42-1411(2)(a)-(j). That statute provides:

> (2) The director shall determine the following elements, to the extent the director deems appropriate and proper, to define and administer the water rights acquired under state law:
> (a) the name and address of the claimant;
> (b) the source of water;
> (c) the quantity of water used describing the rate of water diversion or, in the case of an instream flow right, the rate of water flow in cubic feet per second or annual volume of diversion of water for use or storage in acre-feet per year as necessary for the proper administration of the water right;
> (d) the date of priority;
> (e) the legal description of the point(s) of diversion; if the claim is for an instream flow, then a legal description of the beginning and ending points of the claimed instream flow;
> (f) the purpose of use;
> (g) the period of the year when water is used for such purposes;
> (h) a legal description of the place of use; if one (1) of the purposes of use is irrigation, then the number of irrigated acres within each forty (40) acre subdivision, except as provided in section 42-219, Idaho Code;
> (i) conditions on the exercise of any water right included in any decree, license, or approved transfer application; and
> (j) such remarks and other matters as are necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director.

IDWR concluded that a facility volume limitation was necessary for each of these rights to define one or more of the elements -- quantity, nature or purpose of use, or place of use. In the alternative, IDWR included facility volume as necessary to further define or administer each of these rights.

THE NATURE OF FACILITY VOLUME REMARK

It is unnecessary for the Court to enumerate each of the twenty (20) claimed rights and the specific language actually appearing in each right, because it is the general concept which is being decided here, and not the proposed individual language on each right.[2] The following examples are provided for illustrative purposes:

Example 1: 36-02356

By Blue Lakes Trout Farm Inc.'s ("Blue Lakes") second amended notice of claim under 36-02356, it claimed a total of 100 cfs from Alpheus Creek for fish propagation, domestic and commercial uses with a priority date of May 29, 1958, based on a license. In his *Amended Director's Report Regarding Claim to Water Right No. 36-02356,* dated July 7, 1997, the Director recommended the claim as filed. However, under the quantity element, the Director included the language -- facility volume 10.66 af. The Director also described the non-irrigation uses: "commercial/fish facility; domestic/2 homes; fish/49 ponds, hatch." The single contested issue was whether facility volume should be decreed by the SRBA Court for fish propagation water rights.

Example 2: 36-07210

Blue Lakes filed its claim under 36-07210 claiming 45 cfs from Alpheus Creek for fish propagation with a priority date of November 17, 1971, based on a license. The Director recommended the claim as filed, but under remarks, the Director included the same language as before -- facility volume 10.66 af. The Director described the non-irrigation uses: "fish/49 ponds, 38 hatchery tanks."

Example 3: 36-07427

2 It should be noted here that some of the licensed rights contained a facility volume remark in the actual license which was issued by IDWR and the license holder did not object to its inclusion. For others, the licenses were issued with no such remark.

Under 36-07427, Blue Lakes claimed 52.23 cfs from Alpheus Creek for fish propagation with a priority date of December 28, 1973, based on a license. Again, the Director recommended the claim as filed, but with the remark -- facility volume 3.67 af. The Director described the non-irrigation uses: "fish/commercial fish facility, 10 ponds @ 20' X 200' X 4'." The Director also included under remarks: "A measuring device of a type approved by IDWR shall be maintained as part of the diverting works."

Example 4: 36-07720

Under 36-07720, Blue Lakes claimed 37.1 cfs from waste water for fish propagation with a priority date of June 8, 1977, based on a license. Unlike before, in the remarks section of the *claim*, Blue Lakes stated: "facility volume = 1.5 af, water used under this license if discharged into a natural channel shall meet Idaho water quality standards." The Director recommended the claim as filed, but with facility volume 1.16 af. The Director described the non-irrigation uses: "fish propagation/10 ponds @ 14' x 120' x 3'." Under remarks, the Director also stated: "Return flow if discharged to a surface water system shall meet Idaho water quality standards."

THE STANDARD OF REVIEW

A. Statutory Construction

As noted earlier, IDWR included a facility volume limitation on these rights based upon the assertion that it was necessary to define elements of the rights or as necessary to define or administer the right pursuant to I.C. § 42-1411(2) and, as such, the interpretation of I.C. § 42-1411 is a question of law. Statutory interpretation begins with the words of the statute, giving the language of the statute plain, obvious, and rational meaning. If statutory language is clear and unambiguous, a court applies the statute without engaging in any statutory construction. *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 727, 732, 947 P.2d 400, 405 (1997). Further, I.C. § 73-113 provides that "[w]ords and phrases are construed according to the context and the approved usage of the language." If it is necessary for the court to construe a statute, then it will attempt to ascertain legislative intent. 130 Idaho at 733. "In construing a statute, the court may

examine the language used, the reasonableness of the proposed interpretations, and the policy behind the statute." *Id*.

A basic rule of statutory construction is that the application of a statute is an aid to construction, especially where the public relies on that application over a long period of time. *Id*. at 733. Where contemporaneous and practical interpretation has stood unchallenged for a considerable length of time, it will be regarded as important in arriving at the proper construction of a statute. *Id*. at 734.

The Idaho Supreme Court has recently emphasized that it will accord deference to agency construction of a statute when certain conditions are met. An agency's construction of a statute will be given great weight if:

1) the agency has been entrusted with responsibility to administer the statute at issue;

2) the agency's construction of the statute is reasonable;

3) the statutory language at issue does not expressly treat the precise question at issue; and,

4) any of the rationales underlying the rule of deference are present.

Id. at 734.

B. Asserted Elements of a Water Right

Again, as noted above, IDWR concluded that a facility volume limitation was necessary for these rights to define one or more of the elements -- quantity, nature or purpose of use, or place of use; or, in the alternative, necessary to further define or administer these rights (in water parlance, what is commonly referred to as a "remark," as opposed to a more specific and traditional element of a water right such as source or quantity).

With respect to the "remark" section, or I.C. § 42-1411(2)(j), there are three (3) possible statutory components which need to be examined. They are:

1) whether the remark is necessary for definition of the right, or

2) whether the remark is necessary for clarification of any element of a right, or

3) whether the remark is necessary for the administration of the right by the Director.

BASIC CONCEPTS OF FACILITY VOLUME IN FISH PROPAGATION

The records in these subcases, as the Court understands them, appear to establish the following basic concepts of facility volume as that term is used in these water right claims for fish propagation.

Facility volume appears to be an expression of the size (dimensions) of a given fish facility by stating the maximum existing capacity or water volume of particular fish facility ponds, raceways, settlement basins, and the like, including in some instances also an inventory of the number of ponds, tanks or raceways serviced by a particular water right, **at the point in time** when the Director issued his report for that water right claim.

Exhibit 14 in the Blue Lakes subcases is an Administrator's Memorandum from IDWR dated August 9, 1979. It states in part:

> It is difficult to calculate water needs for fish farming since production is usually based on the amount of water available rather than the amount of land or the size of the facilities.

As such, IDWR has historically admitted that fish production (pounds of fish raised) is, in reality, not dependant on the size of a given facility, rather production is mostly dependant on the flow rate of available water.

Additionally, the record is clear and it is uncontradicted that the particular water users at issue use all available water from its source, not in excess of the limits of their respective licenses or beneficial use claims. The record is equally clear and uncontradicted that the available water from the respective sources fluctuates from time to time, either as a result of naturally occurring climatic conditions or by diversions by other users, or both.

IDWR has as a "rule of thumb" that it will not specify a storage component in a water right if a facility will fill in a day (not greater than 24 hours) given the direct flow rate or if a facility does not hold the same water more than a day. *See Reporter's Transcript, Re: Trial on the Merits in Subcase Nos. 36-2356, 36-7210, 7427 & 7720* (September 4, 1997) at page 105-108. Obviously a bright-line rule is necessary for determining when a storage component is needed to describe a water right because there is potentially some "storage" involved in all water rights, whether describing a reservoir, a fish propagation pond, or the charging of an irrigation system. In all of these facilities at issue, the water is turned over many times each day from the

direct flow right, usually at least twelve (12) times per day. As such, in accordance with the policy of IDWR, none are considered storage rights; i.e., they do not have a storage component.

Lastly, it is universally agreed that these water uses for fish propagation are both beneficial and non-consumptive. There is obviously some water consumed and/or lost by evaporation, but it is so negligible that it cannot be accurately measured, and that is the basis for IDWR considering these uses as non-consumptive.

THE QUANTITY ELEMENT – I.C. § 42-1411(2)(C)

The quantity element, as claimed by the respective claimants in these subcases, was reported out by the Director as claimed. No objections were filed to the quantity element of these Director's Reports. As such, the claimants involved in this Challenge argue that quantity was never at issue and was not tried before the respective Special Masters.

Diversion rate is an instantaneous measurement called cubic feet per second (cfs) and is the legal standard for the measurement of water in this state. I.C. § 42-102. Diversion volume is calculated by the diversion rate (cfs) over a one-year period of time, and it is measured in acre feet per year (afy). When the licenses at issue here were issued, they were licensed for diversion rates with diversion volumes consistent with a full year's use.

IDWR's inclusion of a facility volume remark was, in part, stated by Mr. Tuthill of IDWR, to further define the quantity element, i.e., to add a "third parameter" (cfs, afy and facility volume). I.C. § 42-1411(2)(c) defines the manner in which quantity shall be described as:

> [T]he quantity of water used describing the rate of water diversion or, in the case of an instream flow right, the rate of water flow in cubic feet per second or annual volume of diversion of water for use or storage in acre-feet per year as necessary for the proper administration of the water right.

Where statutory language is clear and unambiguous, the court applies the statute without engaging in statutory construction, giving the language its plain, obvious, and rational meaning. 130 Idaho at 733. The statute requires quantity to be measured by rate of diversion or flow in cfs or afy. I.C. § 42-1411(2)(c) does not include facility volume as a prescribed method of measuring quantity. This Court holds that the plain meaning of the statute does not provide for describing or

limiting quantity by facility volume.[3] Nor has it been rationally established that a facility volume remark would assist in further defining the fish propagation right as to quantity because, by definition, it is a non-consumptive use and the water used is not stored; it simply flows through the facility and is discharged at the end of the facility. As such, the quantity element of the right (so long as it is applied to its intended beneficial use and is not wasted) could not be abused so long as the diversion rate did not exceed the allowable cfs, regardless of the number or size of the ponds, raceways, etc. It is also extremely curious to the Court that it is IDWR's position that if additional ponds were added to a facility for the purpose of pollution control, this would not be considered an increase in facility volume, but if the additional ponds or raceways were to actually grow fish in, it would be an increase in facility volume. To this Court, this is at least a tacit admission by IDWR that its proposed facility volume remark has nothing to do with the quantity element, but is intended to directly deal with regulating production so that in the event of a future delivery call, and mitigation is sought, junior water users may be required to pay less. This position is contrary to at least two fundamental principles of water law: the prior appropriation doctrine and the goal of obtaining the maximum beneficial use of water. Additionally, this illustrates that trying to regulate fish propagators with facility volume is analogous to IDWR trying to regulate an irrigator to the type or quantity of a crop that can be grown, i.e., regulation of production, not quantity of water.

Finally, it bears repeating that production of fish is primarily related to the rate of flow, not the size of the facility.

THE NATURE OR PURPOSE OF USE ELEMENT – I.C. § 42-1411(2)(f)

IDWR asserted that the nature of use element has been used in the past as a reason and part of its rationale to include a facility volume remark. The rationale is that IDWR would consider an increase in facility volume as being a change in nature of use requiring a transfer under I.C. § 42-222. A change in facility volume is clearly not the type of change contemplated under I.C. § 42-222. A change in nature or purpose of use occurs when, for example, a user changes from an irrigation use to a domestic or manufacturing use, etc. Going from a fish

3 As discussed below, a facility volume limitation is not really a limitation of quantity, rather it is a limitation on

propagation use to an increased or different fish propagation use is not a change in nature of use contemplated under I.C. § 42-222 and does not support the rationale.

It is inconceivable that a farmer changing a crop from pasture to alfalfa on a licensed place of use would constitute a change in the nature of use. Likewise inconceivable would be the notion that changing seed varieties of the same crop in an effort to increase production would be a change in the nature or purpose of use.

Finally, as Special Master Bilyeu noted, "the plain meaning of 'purpose of use' in I.C. § 42-1411(2)(f) requires water rights be described by broad category of use such as mining, domestic, or irrigation, and does not require minute details of operation such as number of ditches, sprinklers, or facility volume limitations." *Special Master Report*, 36-07071, page 5, May 19, 1998.

THE PLACE OF USE ELEMENT – I.C. § 42-1411(2)(h)

IDWR also asserted that it included a facility volume remark to further define the place of use. I.C. § 42-1411(2)(h) establishes that place of use shall be described by:

> [A] legal description of the place of use; if one (1) of the purposes of use is irrigation, then the number of irrigated acres within each forty (40) acre subdivision, except as provided in section 42-219, Idaho Code.

I.C. § 42-1411(2)(h) does not include facility volume as a prescribed method of describing the place of use. This Court holds that the plain meaning of the statute requires a standard legal description for the place of use, not a facility volume limitation. Furthermore, an examination of the respective Director's Reports reveals that IDWR describes the place of use by legal description and not by a description of the fish facility.

Again, the non-consumptive use of water by fish propagators in the water claims before the Court needs to be kept in mind. Fish propagation rights are unlike water rights for irrigation which are limited by acres, which is because irrigation rights are clearly a consumptive use. If an irrigator irrigates more/additional acres, then by definition more water will be consumed because more acres are irrigated, and less will be available in the overall water system.

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the utility of the water given the quantity element of the right.

A domestic user, whose use is considered to be *de minimis*, and hence essentially non-consumptive, who constructs an addition to his house, is not considered to have changed the place of use. Likewise, a fish propagator using five connected raceways instead of four could not rationally be considered to have changed the place of use.

"REMARKS" -- OTHER MATTERS NECESSARY TO DEFINE OR ADMINISTER – I.C. § 42-1411(2)(j)

I.C. § 42-1411(2)(j) provides for the inclusion of "such remarks and other matters as are necessary for the definition of the right, for clarification of any element of a right, or for administration of the right by the director." IDWR also asserted that it included facility volume as a "matter necessary to define or administer." As stated under the Standard of Review above, the query is whether a facility volume limitation is necessary to define a water right, to clarify an element, or to administer this right. Keeping in mind, as discussed above, facility volume does not define or clarify quantity, nature or purpose of use, or place of use, therefore, the first two factors, define or clarify, have been answered. Therefore, the necessity of the facility volume remark for administration is addressed.

A. Water Quality

IDWR asserts that a facility volume remark is necessary for administration of water quality.

There are at least three significant reasons why IDWR's position on quality is wrong.

First, there is no showing that facility volume is rationally related to water quality; i.e., there is no nexus between the two. From the record, it clearly appears that water quality is primarily a function of the fish husbandry practices employed, not the physical size of the facility. Therefore, to be legally necessary there would have to be this nexus.

Second, IDWR's duty with respect to water quality was outlined by the Idaho Supreme Court in *Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985). In that case, the Supreme Court held that the primary function of "policing water quality" rests with the Department of Health and Welfare [now DEQ and EPA], not with IDWR. *Id*. at 341. The Supreme Court held that "Water Resources should condition the issuance of a permit on a showing by the applicant that a

proposed facility will meet the mandatory water quality standards." *Id*. However, once the facility is complete, "later compliance with those laws after construction of a facility generally will be a proper concern of the Department of Health and Welfare." *Id.* In these subcases before the Court, the water rights are not in the permit stage. All the water rights have ripened into licenses, or were beneficial use claims. Since the water rights have vested and the structures are complete, it is not the current function of IDWR to police water quality. Water quality is policed by DEQ and EPA. As such, if there were to be a legitimate remark in either a permit or a license relative to water quality, it would not be directed to the existing size of the facility, but rather would be directed that the facility, regardless of its size, would be managed to meet required water quality standards.

The third reason is that water quality is a question of fact. In *Randall v. Northfork Placers,* 60 Idaho 305, 91 P.2d 368 (1939), the Idaho Supreme Court considered an action for damages to a downstream user's lands and irrigation ditches alleged to have been caused by mud and silt being deposited into the Northfork River by an upstream mining operation, which deposits then washed downstream into the irrigation ditches.

The Supreme Court stated:

> Numerous authorities announce the doctrine that while a proper use of the water of a stream for mining purposes necessarily contaminates it to some extent, such contamination or deterioration of the quality of the water cannot be carried to such a degree as to inflict substantial injury upon another user of the water of said stream. (citations omitted). We believe the rule stated in *Arizona Copper Co. v. Gillespie,* 12 Ariz. 190, 100 Pac. 465; Id.; 230 U.S. 46, 33 Sup. Ct. 1004, 57 L. ed. 1384, is controlling in this case, namely:
>
> "We do not mean to say that the agriculturist may captiously complain of a reasonable use of water by the miner higher up the stream, although it pollutes and makes the water slightly less desirable, nor that a court of equity should interfere with mining industries because they cause slight inconveniences or occasional annoyances, *or even some degree of interference, so long as such do no substantial damage*." (emphasis theirs).
>
> "**What deterioration in quality would injuriously affect the water for irrigation**, and whether or not the deterioration to which the defendant company subjected the waters in question injured the land of the plaintiff, **were matters of fact**;" (citation omitted).
>
> The author of *Hill v. Standard Mining Co., supra,* closes his dissertation with reference to the sufficiency of the complaint therein referring to Lindly on Mines and Cooley on Torts, as follows:

> "The right to the use of a stream for depositing debris from mines is discussed in section 840, volume 2, of Lindly on Mines. Many cases from the various states of the Union are cited and discussed by the author. He closes his text as follows: '**No positive rule of law can be laid down to define and regulate such use with entire precision. As to this, all courts agree. It is a question of fact to be determined by the jury.**' This conclusion certainly seems reasonable and logical.

Id. at 311, 312 and 313 (bold emphasis added).

The same reasoning applies to the fish propagator's use of water which is returned to the stream. Questions of excessive pollution in a water source are questions of fact to be made on a case-by-case basis, at least for the use of water for fish propagation. As such, a "one size fits all" rule in the form of a facility volume remark is wholly inapplicable. All of the evidence is to the effect that the size of the facility has no demonstrable effect on water quality. How an individual facility is managed or mismanaged clearly does impact water quality and a facility volume remark adds nothing.

B. Local Public Interest

In *Idaho Conservation League, Inc. v. State*, 128 Idaho 155, 911 P.2d 748 (1995), the Idaho Supreme Court held that the public trust is not an element of a water right used to determine the priority of that right in relation to the competing claims of other water right claimants. Thus, the SRBA lacks jurisdiction to consider the public trust in the adjudication of these claims.

Pursuant to *Matter of Hidden Springs Trout Ranch, Inc.*, 102 Idaho 623, 636 P.2d 745 (1981), specifically dealing with statutory local public interest, the Supreme Court held that the public interest could not be considered with respect to rights which had vested. All of the claims here have vested into licenses and/or are beneficial use claims. They are not applications to appropriate water or a permit, and this is not a transfer proceeding under I.C. § 42-222. As such, facility volume remarks cannot be considered under the local public interest.

C. Mitigation

It is essentially undisputed that until 1997, IDWR's stated purpose for including a facility volume remark was to regulate water quality. However, since 1997 IDWR has asserted that a

facility volume remark helps to "define the extent of beneficial use" for purposes of mitigation[4] in time of water shortage. In other words, if a senior fish propagator made a water delivery call on junior water users, the junior users could offer mitigation in the form of money instead of ceasing their use of the called water. However, while mitigation may be voluntarily exercised between private parties, IDWR freely admits it cannot compel a senior user to accept mitigation in the event of a water delivery call. The right of senior water right holders to have water delivered "first in time, first in right" is constitutionally protected. Idaho Constitution, Art. VX. § 3. Therefore, since IDWR has no authority to compel mitigation, this cannot serve as a legal basis for the inclusion of a facility volume remark.

Licenses Issued With and Licenses Issued Without the Facility Volume Remark

As stated earlier in this Decision, some of the water rights licenses were issued with a facility volume remark which was not challenged by the license holder at the time. Other licenses were issued without the facility volume remark and the remark appeared for the very first time in the Director's Report for the respective claimed right.

In his July 31, 1998, *Supplemental Findings of Fact and Conclusions of Law (Facility Volume)*, then Special Master Haemmerle ruled as follows:

> **F. THE LICENSES**
>
> As indicated, some of the water rights based on licenses had facility volume inserted when the licenses were issued. Most of the water rights based on licenses, however, had facility volume inserted in the Director's Report long after the licenses were issued. The inquiry is what relevance or finality previously issued licenses have between Claimants and IDWR in the context of the SRBA. Stated differently, the inquiry is whether the purpose of the SRBA is to inventory licenses or to recondition and reallocate licenses.
>
> The Director has the authority to insert such remarks as are necessary to define, clarify, or administer a particular water right. I.C. § 42-1411(2)(k). On the other hand, a license once issued by IDWR "shall be binding upon the state as to the right of such licensee to use the amount of water mentioned therein, and shall be prima facie evidence as to such right." I.C. § 42-220 [footnote 2 cited]. As applied, IDWR is part of the "state" as the word is used in I.C. § 42-220 [footnote 3 cited]. As between the two statutes, there is a conflict only when a remark redefines the use

4 *See generally, Rules For Conjunctive Management of Surface and Ground Water Resources*, IDAPA 37.03.11, *et seq.*.

of a licensed water right. Under these circumstances, the question is which statute controls.

The inquiry involves principles of statutory construction. "It is a basic tenet of statutory construction that a more general statute should not be interpreted to encompass an area already covered by a special statute." *In Re SRBA Case No. 39576* (24 Hagerman Subcases), 130 Idaho 736, 947 P.2d 409, 416 (1997). "[T]o the extent that two statutes conflict, the more specific governs over the more general." *Id*. Here, the more specific and, therefore, controlling statute is I.C. § 42-220 which expressly states that licenses are binding on the state [footnote 4 cited].

[footnote 2] *In Re SRBA Case No. 39576* (24 Hagerman Subcases), 130 Idaho 736, 947 P.2d 409 (1997), the Idaho Supreme Court held that "[n]owhere in Title 42 is the Director 'obligated to accept a prior decree' issued in a private adjudication 'as being conclusive proof of the nature of a water right.'" *Id.* at 414. Unlike prior decrees, Title 42 does require the state to accept license as conclusive proof of a user's right to use water as stated in the license. I.C. § 42-220.

[footnote 3] For purposes of the adjudication of water right under Title 42, Chapter 14, Idaho Code, IDWR has been separated from other state agencies. I.C. § 42-1401B. Under the adjudication statutes, however, the Director's role is to report "claims to water rights acquired under state law." I.C. § 42-1401B. Here, the licenses were acquired and perfected under state law. These licenses are binding on the state and constitute *prima facie* evidence of the water right and should be reported accordingly. I.C. § 42-220.

[footnote 4] There are exceptions to the finality of a license in that the use of a license may change subjecting the license to claims of abandonment, forfeiture, adverse possession, estoppel, or waste. Also, a license is subject to review in a transfer proceeding. I.C. § 42-222.

Although a remark cannot be inserted to redefine the use of a previously issued license, a remark may be inserted to administer or clarify a right so long as the remark does not alter or restrict the use of the license. A similar issue was addressed by the Idaho Supreme Court in *In Re SRBA Case No. 39576* (Basin-Wide Issue 5B), __ Idaho __, 951 P.2d 943 (1998). In that case, the issue was whether the court was required to decree certain general provisions contained in a prior decree. Addressing the legitimate and potential need for general provisions, the Court stated: "Finality in water rights is essential. 'A water right is tantamount to a real property right, and is legally protected as such.' An agreement to change any of the definitional factors of a water right would be comparable to a change in the description of property." *Id.* at 4 (citations omitted). Remarks are much like general provisions. Both may be used to further define a water right. I.C. §§ 42-1411(2)(k) and 42-1411(3). Like a prior decree, any attempt to redefine a license would be "tantamount" to altering a real property right. In this case, IDWR issued licenses for water rights 36-02048, 36-02703, 36-02708, 36-07040, 36-07083, and 36-07148. None of these licenses contained remarks addressing facility volume. To the extent that IDWR considers facility volume as a further restriction on these licenses, an attempt to insert facility volume in the context of the SRBA would violate the binding affect of licenses as set forth under I.C. § 42-220. The SRBA cannot serve as a second opportunity for IDWR to recondition a license which it had a full opportunity to condition when the license was originally issued. *See e.g., Matter of Hidden Springs Trout Ranch, Inc., v. Alred*.

> Having determined that I.C. § 42-220 binds the state to licensed rights, those same licenses are also binding on the license holder. If a party is aggrieved by any aspect of a license, that party's remedy is to seek an administrative review and then, if necessary, a judicial review of the license. I.C. §§ 42-1701(A) and 67-5270; *Hardy v. Higginson,* 123 Idaho 485, 849 P.2d 946 (1997). If the license is not appealed when issued, any attempt to appeal the license in a subsequent judicial proceeding, like the SRBA, would constitute a collateral attack on the license. [footnote 5 cited]. *See e.g., Mosman v. Mathison,* 90 Idaho 76, 408 P.2d 450 (1965); *Bone v. City of Lewiston,* 107 Idaho 844, 693 P.2d 1046 (1984). In this case, Claimant did not appeal the remarks addressing facility volume for water rights 36-07201, 36-07218, and 36-07568. Therefore, Claimant is bound by the licenses for these rights.
>
> In evaluating the licenses where facility volume was included when the licenses were issued, the court notes that there is no express provision in the licenses indicating the relevance of the remarks. As previously indicated, the court cannot find any rational reason why the remarks exist. When confronted with an ambiguous element contained in a prior decree or license, the court may clarify the ambiguous element or provision. I.C. § 42-1427(b). Therefore, to clarify this ambiguity, the

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[footnote 5] The court expresses no opinion as to whether parties in the SRBA, not parties to a license, can challenge a license in the SRBA. That issue is not before the court.

> court will recommend that facility volume be included for water right numbers 36-07201, 36-07218, and 36-07568 with the following additional language: "The remark addressing facility volume is included in this water right only because the remark appeared on the license. The remark addressing facility volume does not define the extent of beneficial use and cannot be used to limit any element of this water right. The remark shall not prevent the owner of the license from expanding facility volume."
>
> For these reasons, the licenses at issue are final and binding on both the Claimant and IDWR.

As to those licenses which contained a facility volume remark when issued, Special Master Haemmerle held that the remark must remain in the license, but it is ambiguous, and because it was ambiguous the Court could clarify the remark. I.C. § 42-1427(1)(b). The clarifying remark was to be:

> The remark addressing facility volume is included in this water right only because the remark appeared on the license. The remark addressing facility volume does not define the extent of beneficial use and cannot be used to limit any element of this water right. The remark shall not prevent the owner of the license from expanding facility volume.

This Court agrees with the Special Master that the remark must remain in the license but can be clarified for the following reasons. First, by adopting this recommended language it confirms that the "claimant is not exceeding any previously determined and recorded element of the decreed or licensed water right" I.C. § 42-1427(1)(b). The supporting reasons again need to be restated here.

1. The use of water for fish propagation is a non-consumptive use.

2. There is no storage component; regardless of the size of the facility, the water just continuously flows through and is "turned over" at lease twelve (12) different times each day.

3. The user continuously uses all available water up to the limit of his right; water flows primarily affect production, not the size of the facility.

In other words, it would be like having a water right for 100 cfs flowing out of a spring in the Snake River Canyon wall which then flows into a large pipe, flows the length of the pipe, and then discharges off the user's property. Does it make a difference if the user increases the length of the pipe from 200 feet to 400 feet? Or if a hydropower plant with one generator were able to place two generators in the stream instead of one?

The court cannot limit "the extent of beneficial use of the water right" in the sense of limiting how much (of a crop) can be produced from the use of that right, so long as there is not an enlargement of use of the water right. In fact, the stronger argument is presented in *Munn v. Twin Falls Canal Co.*, 43 Idaho 198, 208; 252 P.865 (1926):

> It is a cardinal principle established by law and the adjudications of this court that the highest and greatest duty of water be required. The law allows the appropriator only the amount actually necessary for the useful or beneficial purpose to which he applies it. What constitutes a reasonable use of water is a question of fact, and depends upon the circumstances of each case. No person is entitled to use more water than good husbandry requires.

In other words, because the use is a non-consumptive, continuous flow use, the highest and greatest duty of the water would seem to encourage the grower to use his or her best efforts to maximize the crop obtained from using the water. And if this means the grower under these circumstances can economically produce 200 pounds of fish versus 100, there is no legitimate policy in water law for not allowing this to occur.

CONCLUSION AS TO FACILITY VOLUME

Each of the respective Special Masters determined that the Claimants have met their burden in establishing that facility volume is not necessary as a traditional element of a water right, I.C. § 42-1411(2)(a)(b), or as a remark for the definition of the right, for clarification of any element of a right, or for administration of the right by the Director, I.C. § 42-1411(a)(j). Each of the Special Masters has cited to various portions of the evidence produced in their respective trials/hearings. Each has used their own factual and legal basis for their respective conclusions that facility volume remarks should not be included.

This Court adopts each of the respective Special Master's Reports and Recommendations including the underlying findings of fact and conclusions of law upon which they are based. There is no basis to find that their respective findings of fact are clearly erroneous or that their respective conclusions of law are not correct.

V.

"ADDITIONAL EVIDENCE" ISSUE

THE ISSUE

NSGWD sought to have the respective Special Masters consider additional evidence in the form of testimony and affidavits in support of its *motion to alter or amend* filed in the various subcases. Each of the respective Special Masters refused to consider additional evidence. Two of the Special Masters ruled that I.R.C.P. 59(e) governed motions to alter or amend Special Master's Reports. Another Special Master reviewed the motion under I.R.C.P. 53(e)(2) and also applied the "good cause" standard contained in I.R.C.P. 55(c). As noted above, the consolidated issue is stated in the Challenge to be:

> Which standard is applicable to the submission of evidence in conjunction with motions to alter or amend special masters' reports in the SRBA, Rule 59(e), I.R.C.P. which applies post-judgment, or Rule 53(e)(2), I.R.C.P. which applies to special master's reports?

STANDARDS OF REVIEW

Regarding I.R.C.P. 53(e)(2)**,** Administrative Order 1 (AO1) § 13(f) provides:

> The court shall accept the Special Master's findings of fact unless clearly erroneous. The court may, in whole or in part, adopt, modify, reject, receive further evidence, or remand it with instructions. I.R.C.P. 53(e)(2).

I.R.C.P. 53(e)(2) provides:

> In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within fourteen (14) days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon the objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or reject it in whole or in part or may receive further evidence or may recommit it with instructions.

In *Seccombe v. Weeks*, 115 Idaho 433, 767 P.2d 276 (Ct. App. 1989), the Court of Appeals stated:

> The appointment of a master does not displace the district court's role as the ultimate trier of fact. Under I.R.C.P. 53(e)(2), the district court is mandated to accept the master's findings of fact unless clearly erroneous; consequently, the trial court must independently review the evidence to determine whether the findings were supported by substantial evidence. The master's conclusions of law, however, carry no weight with the trial court. Therefore, Rule 53(e)(2) permits the court to adopt the master's report, modify it, supplement it with further evidence, recommit it to the master with instructions, or reject it in whole or in part.

Id. at 435, 767 P.2d 278.

Regarding I.R.C.P. 59(e):

> A Rule 59(e) motion to amend a judgment is addressed to the discretion of the court. An order denying a motion made under Rule 59(e) to alter or amend a judgment is appealable, but only on the question of whether there has been a manifest abuse of discretion. Rule 59(e) proceedings afford the trial court the opportunity to correct errors both of fact or law that has occurred in its proceedings; it therefore provides a mechanism for corrective action short of an appeal. Such proceedings must of necessity, therefore, be directed to the status of the case as it existed when the court rendered the decision upon which the judgment is based.

Coeur d'Alene Min. Co. v. First Nat'l. Bank of N. Idaho, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990)(quoting *Lowe v. Lym*, 103 Idaho 259, 263, 646 P.2d 1030, 1034 (1982)).

ANALYSIS –MOTION TO ALTER OR AMEND

The issue regarding the appropriate standard for allowing the introduction of additional evidence in conjunction with a motion to alter or amend the findings of fact and conclusions of law of a special master is not one of first impression for this Court. This issue was previously analyzed in detail in *In Re SRBA Subcases 36-00061, 36-00062, and 36-00063, Memorandum Decision and Order on Challenge* (September 27, 1999*) ("Memorandum Order").* NSGWD was also a party to those subcases. In the *Memorandum Order*, this Court discussed the procedural rules and accompanying standards which arguably could apply in the context of a motion to alter or amend a special master's recommendation brought pursuant to AO1 § 13(a). *Memorandum Order at* 20-29. The Court's entire discussion will not be reiterated here. In sum, this Court ruled that the standards of I.R.C.P. 59(e) were instructive in the context of a motion to alter or amend a special masters findings of fact and conclusions of law, but that the Rule did not literally apply because a prior judgment is not entered at the special master stage of the proceeding. *Memorandum Order* at 26-27. This Court also noted that I.R.C.P. 59(e) does not provide a procedure for the introduction of additional evidence. *Id.* Rather, that in accordance with existing precedent, I.R.C.P. 59(e) motions apply to the findings of fact and conclusions of law based on the status of the existing record. *See e.g., Idaho First Nat'l. Bank v. David Steed & Assoc.*, 121 Idaho 356, 361, 825 P.2d 79, 84 (1992) (citing *Coeur d'Alene Mining Co. v. First Nat'l Bank*, 118 Idaho 812, 800 P.2d 1026 (1990)(trial court lacks jurisdiction to consider new facts in conjunction with a motion to alter or amend pursuant to I.R.C.P. 59(e)). This Court held that I.R.C.P. 52(b) more appropriately applied to the circumstances surrounding AO1 § 13(a), in particular because a motion to alter or amend can be brought pursuant to I.R.C.P. 52(b) prior to the entry of judgment. *Memorandum Order* at 27-28. However, the applicable standard for amending the findings of fact, whether prior to, or post-judgment, is effectively the same. Rule 52(b) allows a court to correct or augment its findings so that an appellate court may have a clear understanding of how the trial court arrived at its decision. The Rule is not intended to allow parties to advance new legal theories or relitigate the merits of a case. *See Memorandum Order* at 27 (citing *9 Moore's Federal Practice* 52.60 (party may move to amend findings of fact, even if modified or additional findings would effectively reverse the judgment)). A motion to alter or amend findings provides a mechanism for the trial court to correct both errors of fact and law

short of an appeal. *Lowe v. Lym*, 103 Idaho 259, 263, 646 P.2d 1030, 1034 (Ct. App. 1982)(citing *First Security Bank v. Neibaur*, 98 Idaho 598, 570 P.2d 276 (1977)).

This Court, in the *Memorandum Order*, also discussed the four grounds for properly granting a motion to amend findings pursuant to I.R.C.P. 52(b): (1) correction of manifest error; (2) newly discovered evidence; (3) change in law; and (4) supplement or amplify findings. *Id.* at 27 (citing *9 Moore's Federal Practice* 52.60[4][a]-[d]). The two grounds which would arguably apply in the context of the instant subcases are the correction of a manifest error and newly discovered evidence. In regards to considering whether to amend the findings on the basis of a manifest error, the trial court considers only the evidence contained in the record. *9 Moore's Federal Practice* 52.60[4][a]. In regards to a motion to amend based on newly discovered evidence, the movant may not introduce evidence that was available at trial but not proferred. Further, it is improper for a party to move to amend in order to advance new theories based on evidence that was proffered at trial or to reassert arguments already rejected by the court. *Id*. at 52.60[4][b].

Lastly, and of significance, is that the determination of whether to grant or deny a motion to amend findings of fact or a judgment is left to the discretion of the trial court (special master) and is therefore reviewed under a "manifest abuse of discretion standard." *Lowe v. Lym*, 103 Idaho 259, 646 P.2d 1030 (Ct. App. 1982). As such, to the extent a special master disallows new evidence in conjunction with a motion to alter or amend brought pursuant to AO1 § 13(a) on the grounds that the proponent is seeking to advance a new legal theory or introduce evidence that was otherwise available at trial, there can be no manifest abuse of discretion. Simply stated, the Rule does not provide a mechanism for advancing new legal theories and/or evidence that was discoverable during the pendency of the action, or to allow a brand new party to the subcase to step forward for the first time and have a new trial.

The proper application and standards of I.R.C.P. 53(e)(2) were also set forth in detail in the Court's *Memorandum Order*. However, since I.R.C.P. 53(e)(2) is specifically directed at the district court (as opposed to a special master), the rule has no application towards establishing a standard or mechanism for the submission of additional evidence at the special master's level of the proceeding absent a directive from the district court. Further, as this Court previously pointed out in its *Memorandum Order*, the district court does not have unfettered discretion to modify the

findings of a special master. *Memorandum Order* at 22-23. Rather, the District Court must accept a special master's findings of fact unless clearly erroneous. *Id*.; A01 § 13(f); I.R.C.P 53(e)(2); *Seccombe v. Weeks*, 115 Idaho 433, 435, 767 P.2d 276, 278 (Ct. App. 1989).

ANALYSIS -- MOTION FOR RECONSIDERATION

Unlike a motion to alter or amend findings, a motion for reconsideration brought pursuant I.R.C.P. 11(a)(2)(B) provides a mechanism for the trial court to consider new or additional facts in support of the motion that bear on the correctness of the interlocutory order. *See Coeur d'Alene Min. Co. v. First Nat'l. Bank of N. Idaho*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990)(distinguishing applicable standards between I.R.C.P. 59(e) motion to alter or amend and I.R.C.P. 11(a)(2)(B) motion for reconsideration). The burden is on the moving party to bring to the trial court's attention to the new facts. *Id.* In *Coeur d'Alene Min. Co.*, the Idaho Supreme Court in distinguishing a motion to alter or amend from a motion for reconsideration, stated:

> A rehearing or reconsideration in the trial court usually involves new or additional facts, and a more comprehensive presentation of both law and fact. Indeed, the chief virtue of a reconsideration is to obtain a full and complete presentation of all available facts, so that the truth may be ascertained, and justice done, as nearly as may be.

Id. (citing *J.I. Case Company v. McDonald*, 76 Idaho 223, 229, 280 P.2d 1070, 1073 (1955)). Although I.R.C.P. 11(a)(2)(B) permits the introduction of additional evidence, that particular procedural rule is not available to a party seeking to participate in a subcase pursuant to AO1 § 13. AO1 § 13(a) provides:

> Any party to the adjudication not already a party to the subcase may file a *Motion to Alter or Amend* within 21 days from the date the ***Special Master's Recommendation*** appears on the Docket Sheet. Any party to the adjudication not already a party to the subcase may respond to a *Motion to Alter or Amend* by filing a *Notice of Participation* which shall set forth the party's name; the water right number; the name, address and telephone number of the attorney; and a short statement of the party's position on the issues presented in the *Motion to Alter or Amend.*

SUMMARY OF THE RESPECTIVE MOTIONS

Although a motion to reconsider is more akin to what NSGWD is seeking from the Court, in accordance with AO1 § 13(a), a party not already a party to a subcase participates in

subsequent proceedings in the subcase by filing, or responding to, a **motion to alter or amend**. The rule does not provide for initiating participation through a different procedural rule, including a motion for reconsideration pursuant to I.R.C.P. 11(a)(2)(B). Since a motion to alter or amend is limited to the record before the court (special master) and does not provide for the introduction of new or additional evidence, a party is limited in that regard. As a related matter, a party cannot subsequently file a motion for reconsideration of a court's ruling on motions brought pursuant to I.R.C.P. 59(e) or 52(b). *See* I.R.C.P. 11(a)(2)(B)(rule does not permit reconsideration of an order entered pursuant to Rules 59(e) and 52(b)). Furthermore, from a practical standpoint, in the context of the SRBA, a procedure allowing new parties to enter a subcase following the recommendation being issued by a special master which permits the new parties to advance new legal theories and evidence in support of those theories would (to put it kindly) result in an inefficient use of judicial resources as well as prejudice to the parties to the subcase by requiring the parties to relitigate their claims or go back to court to defend against issues that were never initially raised.

DUE PROCESS IMPLICATIONS

At oral argument on the Challenge, NSGWD additionally argued that the failure of the respective Special Masters to consider additional or new evidence in conjunction with a motion to alter or amend also raised due process implications. Specifically, NSGWD argued that it would be precluded from getting evidence before the Court of a claimant's actual use of water over a given period of time. The implication being that a claimant has been historically using a lesser quantity of water than the quantity reflected in the claimant's license or prior decree. NSGWD argues that if a special master declines to consider the additional evidence, a special master (and the district court on Challenge) does not have all the relevant evidence necessary to ascertain the truth, but also the net effect is that NSGWD is essentially barred from asserting its legal claim or cause of action based on the proffered evidence (i.e. partial forfeiture or as styled by NSGWD "extent of beneficial use"). Specifically, NSWGD argues it would be forever precluded from raising its legal claim because if the evidence is not admitted by either a special master or at the subsequent direction of the district court, once the partial decree is entered, the claim is barred by principles of *res judicata*. Hence the contention of due process violations.

This due process argument fails for several reasons. First, nothing prevented NSGWD from filing a response to an objection (or an objection) to the Director's Report and becoming involved in the subcase at its inception. This is true even if NSGWD was in agreement with the Director's Report as it had the opportunity to file a response to an objection. Consequently, under any stretch of the imagination NSGWD cannot claim due process violations for any evidence (or cause of action) that was available as of the date of expiration for filing responses to objections to the Director's Report. Further, NSGWD would also have available the option to file a motion to file a late objection based on the discovery of new evidence even after the expiration of the filing date for objections and responses. Simply put, NSGWD could have become timely involved in these subcases and properly raised any related issues before the matter went to trial before the respective Special Masters. NSGWD readily admits, however, that its practice has been to not get involved in the subcase until the special master has issued his or her recommendation; which by orders of reference in these subcases, the evidentiary trial has been held, findings of fact and conclusions of law have been made, and the respective Special Master's Reports and Recommendations have been prepared and filed. In the event NSGWD disagrees with the recommendation, NSGWD then becomes engaged in the subcase via a motion to alter or amend pursuant to AO1 § 13 and then seeks to introduce new or additional evidence and/or raise new legal theories. In one of the consolidated subcases, NSGWD made its strategy readily apparent. NSGWD responded to the Special Master's inquiry as follows (with emphasis):

> **The [Special Master]:** So your strategy is to sit back – although the statute defines time periods to get in the case, you [NSGWD] sit back, wait and see what happens; the case is tried; and then if you get a result you don't like, you ask that it be tried again.
>
> **Ms. Hofstetter: I would say that that's absolutely correct**. I have no – because it's humanly impossible for private parties to get anticipatorily involved in every single subcase that may affect their interests ultimately.

See Reporter's Transcript, Re: Challenge to Recommendations Made by Special Master Fritz Haemmerle in Subcase Nos. 36-02048, 36-02703, 36-04013A, 36-04013B, 36-04013C, 36-07040, 36-07148, and 36-07568, by North Snake Ground Water District (November 17, 1997) at page 77.

Additionally:

> **The [Special Master]:** So every single right that's recommended is subject to a second trial any time before a final decree in the SRBA is entered?
>
> **Ms. Hofstetter:** Potentially, if warranted if the first trial was not adequate and that's demonstrated, yes. That's a possibility.

Id. at pp. 88-89.

Thus it is clear from the record NSGWD made a conscious determination not to become involved in the various subcases. Consequently, NSGWD's due process arguments relating to any available evidence or cause of action that existed prior to expiration of the date for filing objections are without merit. Further, no due process violations are implicated during the pendency of the special master's proceedings for available evidence or causes of action if NSGWD failed to become involved in the proceeding via a motion to file a late objection or a motion to participate, pursuant to AO1. *See e.g.,* AO1 §10(k)(Motion to Participate).

The crux of NSGWD's argument, however, pertains to the introduction of evidence which did not become relevant, or the raising of new causes of action which did not allegedly become ripe, until after the expiration of the time for filing responses to objections to the Director's Report. This situation arises in the context of a cause of action for partial forfeiture pursuant to I.C. § 42-222(2) and related case law. *See State v. Hagerman Water Right Owners, Inc*., 130 Idaho 736, 947 P.2d 409 (1997). To place the matter in proper perspective, NSGWD contends that the evidence sought to be introduced in the consolidated cases was probative of the claimant's "extent of beneficial use." However, as noted in the preceding sections of this opinion "extent of beneficial use" is not an element of a water right. Furthermore, the respective Special Masters already conducted hearings on the quantity element. In this Court's view, although being couched in the phrase "extent of beneficial use," NSGWD is really attempting to raise a cause of action for partial forfeiture or abandonment, or in the alternative, to relitigate the quantity issue. By way of explanation, any evidence that a claimant is using less water than the quantity for which the claimant was previously licensed or decreed, by definition must be in support of an action for partial forfeiture (or abandonment). Partial forfeiture, abandonment or adverse possession are the only cognizable legal theories by which a diminishment could be obtained. In *State v. Hagerman Water Users, Inc.*, 130 Idaho 736, 947 P.2d 409 (1997), the Idaho Supreme Court specifically

held that the quantity element of a water right cannot be reduced merely for non-application to a beneficial use regardless of the length of time the non-application continues. *Id*. at 743, 947 P.2d at 416. Rather, that I.C. § 42-222(2) provides for the loss of water rights for failure to apply the water to a beneficial use for the five (5) year prescriptive period. *Id.* The Supreme Court set forth its reasoning as follows:

> To interpret references to "beneficial use" throughout Title 42 as providing the means by which a water right may be statutorily lost or reduced regardless of the length of time the non-application continues would render the five-year period set forth in I.C. § 42-222(2) meaningless and neglect clear direction from the legislature.

Id. (citing *George W. Watkins Family v. Messenger*, 118 Idaho 537, 539, 797 P.2d 1385, 1387 (1990)). Therefore, unless NSGWD is asserting either partial forfeiture or abandonment of a previously licensed right, evidence of "extent of beneficial use," is irrelevant. Secondly, whether labeling the diminished use as "partial forfeiture" or "extent of beneficial use," unless the five year statutory period has elapsed, there is no cause of action and any related evidence would again be irrelevant. Simply put, there is no legal cause of action for an "anticipatory" partial forfeiture. Lastly, NSGWD also argued (again without referring specifically to "partial forfeiture") that due process concerns are also implicated because NSGWD cannot assert "partial forfeiture" as an objection, or later in the course of the proceedings, until the statutory period has actually elapsed. NSGWD argues that this situation would arise in the event that the five year statutory period does not entirely run until after the objection period has elapsed. In this situation, NSGWD argues that it could never assert a cause of action for "partial forfeiture" (a.k.a. "extent of beneficial use") because an objection can not be filed prior to the statutory period having elapsed because no cause of action has yet matured. Thus, if a special master does not allow the admission of evidence pertaining to the partial forfeiture after the statutory period has elapsed, then NSGWD is essentially forever barred from asserting a "partial forfeiture" or "extent of beneficial use" issue which did not actually ripen until after the expiration of the objection period.

This argument fails because it overlooks the effect that the filing of a claim in the SRBA has on the running of the forfeiture statute. A claim to a water right made in the SRBA is essentially akin to a quiet title action. *See e.g., Federal Land Bank of Spokane v. Union Central Life Ins. Co.*, 51 Idaho 490, 6 P.2d 486 (1931) (pre-adjudication quiet title action for water

right); *Sutton v. Brown*, 91 Idaho 396, 422 P.2d 63 (1966) (quiet title action can necessarily include claim for water right). A notice of claim is a pleading within the SRBA. *Fort Hall Water Users Ass'n v. United States*, 129 Idaho 39, 41, 921 P.2d 739, 741 (1995*) reh'g denied* (1996); AO1 § 2(r). The filing of a notice of claim initiates the procedure for making claim to a water right in the SRBA. I.C. § 42-1409. A partial decree with a rule 54(b) certificate is akin to a final judgment for purposes of appealing as a matter of right. I.C. § 42-1412(6); I.R.C.P. 54(b); AO1 §§ 14,15. As a result, a water right claimant's action is pending from the time a claim is filed until a partial decree is entered.

It is a settled legal principle that the filing of a quiet title action tolls the running of the statute of limitations for establishing title by adverse possession or prescription to the property that is the subject of the action. In *Smith v. Long*, 76 Idaho 265, 281 P.2d 483 (1955), the Idaho Supreme Court held that: "Defendant's title by adverse possession not having matured at the time this action commenced, plaintiffs are entitled to a decree quieting their title as against the claims of the defendants." *Id.* at 494-95, 76 P.2d at 276-77. In *Yorba v. Anaheim Union Water Co.*, 259 P.2d 2 (1953) the California Supreme Court stated: "[O]rdinarily the filing of an action, either by the person asserting a prescriptive right, or by the person against whom the statute of limitations is running, will interrupt the running of the prescriptive period and the statute will be tolled while the action is actively pending." *Id.* at 5. *See also* 25 Am. Jur. 2d Easements and Licenses § 69 (suit brought by claimant interrupts prescriptive period); 3 Am. Jur. 2d Adverse Possession § 127 (effect of suit relates back to date of its commencement, and claimant can acquire no additional advantages by remaining in possession during its pendency). Thus, any period supporting a claim for title by adverse possession or prescription must have accrued prior to the claim being filed. This rule applies to the extent the action is being prosecuted or defended by the legal title holder, and in the event the action is abandoned, the statute is not tolled. 3 Am. Jur. 2d Adverse Possession § 130.

Since forfeiture is a species of adverse possession and prescription, it follows that once a claimant files a claim in the SRBA, for a particular water right, the forfeiture provisions of I.C. § 42-222(2) are also tolled for purposes of establishing forfeiture, so long as the claimant continues to prosecute the claim to partial decree. In *Smith v. Hawkins*, 42 P. 453 (1895), the California Supreme Court, in construing California's then existing water right forfeiture statute, applied by

analogy the same standards for establishing prescriptive title to real property. *Id.* at 454. In *Federal Land Bank of Spokane v. Union Central Life Ins. Co.*, 51 Idaho 490, 6 P.2d 486 (1931), the Idaho Supreme Court, in resolving a water right transfer claim, concurred with the reasoning of the California Supreme Court in *Smith* which applied the standards of prescription and adverse possession to forfeiture. *Id.* at 488 (citing *Smith v. Hawkins*, 42 P. 453 (1895)). Therefore, pursuant to this reasoning, unless a claimant ultimately abandons their claim within the SRBA (which could result in the failure of the entire water right), any alleged time period of non-use subsequent to the filing of the notice of claim cannot be used to establish forfeiture. That being the case, NSGWD cannot be denied due process protections for attempting to present itself in a case with a hearing on the merits to assert a cause of action (i.e. partial forfeiture) which has not yet matured. Further, and on the contrary, if the cause of action for forfeiture has ripened before the claim is filed, it is incumbent on the person seeking to prosecute the forfeiture to get timely involved, (i.e. file an objection/response to the quantity element).

Finally, even if the forfeiture statute were not tolled during the pendency of the proceeding, the decision whether or not to admit new or additional evidence is discretionary with the trial court or in these subcases, the respective Special Masters. Although a motion pursuant to I.R.C.P. 60(b)(2) (i.e. motion to set aside a judgment based on the newly discovered evidence) does not technically apply in this situation, the standard for granting a Rule 60(b) motion is instructive in explaining the deficiency in the due process argument advanced by NSGWD. For example, the due process argument raised by NSGWD could arise in the context of any garden variety legal proceeding where new evidence giving rise to a new legal cause of action or defense which was not previously asserted is discovered after entry of judgment. Similarly, in that particular situation, if the court denies the Rule 60(b) motion, the movant may also be forever precluded from subsequently raising the new legal claim or defense based on the newly discovered evidence. Despite this consequence, the determination whether to grant a Rule 60(b)(2) motion is still discretionary with the court as opposed to a non-discretionary entitlement. *See Roberts v. Bonneville County*, 125 Idaho 588, 592, 873 P.2d 842 (1994)(trial court did not abuse discretion in denying motion based on newly discovered evidence); *Knight Insurance Inc. v. Knight*, 109 Idaho 56, 58-59, 704 P.2d 960, 962-63 (Ct.App. 1985)(distinguishing between discretionary relief and non-discretionary entitlement to relief pursuant to I.R.C.P. 60(b)); 12 Moore's Federal

Practice 3d§ 60.22[1] (except for motion under 60(b)(4), decision as to whether relief should be granted is discretionary)). Consequently, the denial of a Rule 60(b)(2) motion based on the discovery of new evidence does not automatically entitle the movant to have the judgment set aside and a new hearing to present the new evidence. However, if the denial of the motion was considered a denial of due process it would seem that the judgment should be set aside as a matter of course. This is not the case. Rather, the court reviews the evidence in the context of the factors set forth in Rule 60(b)(2) to determine whether or not the evidence should be considered. In sum, since this determination is left to the discretion of the court, the denial of the motion cannot result in a denial of due process.

Next in determining whether the respective Special Masters did in fact abuse discretion in failing to admit and consider the new or additional evidence, the following factors were present. Hearings had already been conducted on the merits, including on the quantity element. NSGWD was not entirely clear as to the legal theory it was advancing in support of a diminishment in quantity. As previously explained, as a matter of law, "extent of beneficial use" by itself is not a viable theory for diminishing a water right. Furthermore, if NSGWD were in fact asserting an "extent of beneficial use" argument then evidence of a prescriptive period is irrelevant, and any evidence offered in support of the "extent of beneficial use" could not be considered "newly discovered" because evidence of the various fish propagating practices was available prior to the commencement of the proceedings. On the other hand, if NSGWD was in fact asserting a claim for partial forfeiture in which a prescriptive period is relevant, the evidence before the respective Special Masters was that the various claimants during the relevant time periods were using all available water such that any reduction in use was based solely on availability in which case partial forfeiture does not result. *See Hodge v.Trail Creek Irrigation Co*., 78 Idaho 10, 16, 297 P.2d 524, 530 (1956)(holding no forfeiture where non-user is prevented from exercising his right to the water by circumstances over which he has no control). Since partial forfeiture must be proved by clear and convincing evidence, NSGWD's alleged newly discovered evidence would have had no impact on the outcome of the recommendations made by the respective Special Masters. *Jenkins v. State Dept. of Water Resources*, 103 Idaho 384, 389, 647 P.2d 1256, 1261 (1982)(clear and convincing proof is required to support a forfeiture). Based on the foregoing, this court cannot find that NSGWD's due process rights were violated.

CONCLUSION AS TO THE "ADDITIONAL EVIDENCE" ISSUE

In conclusion, AO1 § 13(a) provides a mechanism for new parties to enter a subcase following a hearing on the merits and the issuance of the Special Master's Recommendation. A motion to alter or amend under either I.R.C.P. 59(e) or 52(b) does not contemplate the admission of new or additional evidence to advance new legal theories or relitigate the merits of a case. Rather, the tribunal is limited to the existing record. AO1 § 13(a) does not provide for a new party to enter a subcase on a motion for reconsideration (as opposed to a motion to alter or amend). The standards between a motion to alter or amend and a motion for reconsideration are clearly distinguishable. I.R.C.P. 53(e)(2) does not provide a mechanism for a special master to admit new evidence absent a directive from the district court. As such, the respective Special Masters did not err in refusing to admit evidence supporting the advancement of a new legal theory.

Lastly, due process concerns were not implicated because NSGWD could have entered the subcase prior to the hearing on the merits or the cause of action had not ripened by the time the claim was filed. Further any evidence pertaining to an alleged diminishment in quantity following the filing of a claim is irrelevant for establishing a partial forfeiture. Accordingly, the respective Special Masters did not err in refusing to admit NSGWD's evidence pertaining to "extent of beneficial use" subsequent to the hearing on the merits.

IT IS SO ORDERED.

Dated: December 29, 1999.

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BARRY WOOD
Administrative District Judge and
Presiding Judge of the
Snake River Basin Adjudication